NOT YET SCHEDULED FOR ORAL ARGUMENT
Nos. 18-1125, 18-1143

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

LONG BEACH MEMORIAL MEDICAL CENTER, D/B/A MEMORIALCARE LONG BEACH MEDICAL CENTER & MEMORIALCARE MILLER CHILDREN'S AND WOMEN'S HOSPITAL LONG BEACH,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and,

CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES UNITED,
Intervenor for Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD – Case No. 21-CA-157007

BRIEF FOR INTERVENOR
CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED

NICOLE DARO
MICAH BERUL
CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES UNITED
LEGAL DEPARTMENT
155 Grand Avenue
Oakland, CA 94612
(510) 273-2200 – Telephone
ndaro@calnurses.org
mberul@calnurses.org
Counsel for Intervenor

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to the Circuit Rule 28(a)(1), counsel for Intervenor California Nurses Association/National Nurses United ("CNA/NNU" or "Union") certifies the following:

A. Parties and Amici

All parties, intervenors, and amici appearing in this case are listed in the Brief for Respondent National Labor Relations Board ("Board").

B. Ruling Under Review

The ruling under review is a Decision and Order of the Board in *Long Beach Mem'l. Med. Ctr., Inc., d/b/a Long Beach Mem'l. Med. Ctr. & Miller Children's and Women's Hosp. Long Beach*, 366 NLRB No. 66 (April 20, 2018.)

C. Related Cases

This case has not previously been before this Court or any other court, and CNA/NNU counsel is not aware of any related cases.

CORPORATE DISCLOSURE STATEMENT

Intervenor California Nurses Association/National Nurses United (CNA/NNU) submits this statement pursuant to Fed. Rule App. P. 26.1. CNA/NNU states that it is a not-for-profit nurses' union engaged in promoting the general interest of its members and does not have any publicly traded stock.

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TABLE OF AUTHORITIES

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FEDERAL STATUTES AND REGULATIONS - All applicable statutes and regulations are contained in the Statutory and Regulatory Addendum of the Brief for National Labor Relations Board, *Respondent/Cross-Petitioner*.

OTHER

GLOSSARY OF ABBREVIATIONS

A.	The parties' joint appendix
Act or NLRA	National Labor Relations Act, as amended
Board or NLRB NLRB Br.	National Labor Relations Board NLRB brief
CNA, CNA/NNU or the Union	California Nurses Association/National Nurses United
General Counsel	National Labor Relations Board General Counsel
Long Beach LB Br.	Long Beach Memorial Medical Center, d/b/a MemorialCare Long Beach Medical Center & MemorialCare Miller Children's and Women's Hospital Long Beach Long Beach's opening brief
Order or Decision and Order	*Long Beach Memorial Medical Center, Inc., d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66 (April 20, 2018.)

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Intervenor California Nurses Association/National Nurses United ("CNA," "CNA/NNU" or "Union") adopts and incorporates as its own the Statement of Subject Matter and Appellate Jurisdiction of the National Labor Relations Board ("Board" or "NLRB").

STATEMENT OF THE ISSUE

The Union adopts in its entirety and incorporates as its own the Statement of the Issue of the Board.

STATEMENT OF THE CASE

The Union respectfully submits this brief in support of the Board's cross-application to enforce the Decision and Order ("Order") of the National Labor Relations Board, reported at 366 NLRB No. 66, finding that Petitioner Long Beach Mem'l. Med. Ctr., d/b/a MemorialCare Long Beach Med. Ctr. & MemorialCare Miller Children's and Women's Hosp. Long Beach ("Long Beach") committed unfair labor practices in violation of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. ("Act" or "NLRA"). The Union adopts in its entirety and incorporates as its own the Statement of the Case of the Board.

SUMMARY OF ARGUMENT

The Union adopts and incorporates as its own the Board's Summary of Argument. The Union submits the following summary of its additional argument. The Board applied the correct legal standard in union insignia cases, and Long Beach's argument that *The Boeing Co.*, 365 NLRB No. 154 (2017) ("*Boeing*") is the controlling precedent in this case is doctrinally flawed because the Board has already struck a balance between employee rights and employer business interests with regard to union insignia.

The Court lacks jurisdiction to consider Long Beach's argument that *Boeing* should have been applied as the controlling precedent under Section 10(e) of the Act, 29 U.S.C. § 160(e), as Long Beach has never raised this challenge before the Board. Additionally, Long Beach has not raised in any manner in its opening brief before the Court that there are extraordinary circumstances under Section 10(e) to excuse its failure to raise its *Boeing* challenge to the Board. Accordingly, Long Beach has waived the issue of whether there are extraordinary circumstances sufficient to overcome Section 10(e)'s jurisdictional bar.

STANDARD OF REVIEW

"'When the Board concludes that a violation of the Act has occurred, [the Court] must uphold that finding unless it has no rational basis or is unsupported by substantial evidence.'" *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069

(D.C. Cir. 2015) (quoting *Tenneco Auto, Inc. v. NLRB*, 716 F.3d 640, 647 (D.C. Cir. 2013)). Moreover, as the Court has observed, "'it is not necessary that [the Court] agree that the Board reached the best outcome in order to sustain its decisions.'" *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d at 1059 (quoting *Bally's Park Place, Inc.*, 646 F.3d 929, 939 (D.C. Cir. 2011)). Factual findings by the Board are conclusive where they are supported by "substantial evidence." 29 U.S.C. §160(f). In making this determination, the record must be viewed as a whole. *Universal Camera Corp.*, 340 U.S. 474, 488 (1951). The reviewing "court will uphold the decision of the Board unless it was arbitrary or capricious or contrary to law, and as long as its findings of fact are supported by substantial evidence in the record as a whole." *See, e.g., Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 440 (D.C. Cir. 2017). A court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.*, 340 U.S. at 488.

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ARGUMENT

A. The Board Applied the Correct Legal Standard in Union Insignia Cases, and the Court Lacks Jurisdiction to Consider Long Beach's Belated and Erroneous Argument that *Boeing* Is Controlling Precedent in this Case.

1. The Board Applied the Correct Legal Standard.

The Union adopts in its entirety and incorporates as its own the Board's argument that *The Boeing Co.*, 365 NLRB No. 154 (2017) is inapplicable to the analysis of this case. (NLRB Br. 32-37.) The Union submits the following additional argument. The Board's Decision and Order rests on the correct Board and judicial precedent in union insignia cases. The Board stressed that "[i]t is well established that employees have a protected right to wear union insignia at work in the absence of special circumstances." (A. 801.) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945); *George J. London Mem'l Hosp.*, 238 NLRB 704, 708 (1978); *The Ohio Masonic Home*, 205 NLRB 357, 357 (1973), enf'd. 511 F.2d 527 (6th Cir. 1975)). The Board emphasized that "[r]estrictions on wearing union insignia in immediate patient care areas are presumptively valid[,]" citing *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 781 (1979), while "restrictions on wearing union insignia in non-patient care areas are presumptively invalid and violate the Act unless the employer establishes special circumstances justifying its action[,]" citing *Casa San Miguel*, 320 NLRB 534, 540 (1995). (A. 801.)

Not only did the Board's Decision and Order apply the correct legal standard in union insignia cases, as set forth above, but Long Beach's argument (LB Br. at 22-34) that *The Boeing Co.*, 365 NLRB No. 154 (2017) ("*Boeing*") should have been the controlling precedent with regard to the Board's Order is doctrinally incorrect. *Boeing*, it must be stressed, is wholly inapplicable in this context. The Board, in *Boeing*, considered the issue of whether an employer's maintenance of a "facially neutral rule" is unlawful under "prong one" of the *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) ("*Lutheran Heritage*") standard, which addressed whether "'employees would reasonably construe the language to prohibit Section 7 activity[.]'" *Boeing Co.*, 365 NLRB No. 154, slip op. at 1-2 (quoting *Lutheran Heritage*, 346 NLRB at 647); 29 U.S.C. § 157. Emphasizing the Board's "'duty to strike the *proper balance* between. . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,'"[1] the *Boeing* Board overruled the *Lutheran Heritage* "reasonably construe" standard. *Boeing Co.*, 365 NLRB No. 154, slip op. at 2.

As support for its decision to overrule the *Lutheran Heritage* "reasonably construe" standard, the *Boeing* Board relied on other doctrine where there is a balancing of business justifications and employee rights under the Act. *Boeing*

[1] *Boeing Co.*, 365 NLRB No. 154, slip op. at 2, 40 n. 13 (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)).

Co., 365 NLRB No. 154, slip op. at 8 (citing as examples, doctrine regarding solicitation, distribution and access rules). In union insignia cases, the Board has already struck such a balance, utilizing the "special circumstances" test, with additional presumptions in the healthcare setting, discussed above, and thereby considers employee rights in conjunction with asserted business justifications, demonstrating *Boeing's* inapplicability to union insignia cases.[2]

Long Beach's assertion (LB Br. at 30-31) that NLRB General Counsel Memo GC 18-04 (Robb, June 6, 2018) (*available at* *https://apps.nlrb.gov/link/document.aspx/09031d45827f38f1*) "called-out" the Board for not having applied *Boeing* misapprehends General Counsel Robb's guidance to the agency's Regional Directors, Officers-in-Charge, and Resident Officers on handbook rules post-*Boeing*. GC Memo 18-04 instructs that "[r]egions should also note that the Board in *Boeing* did not alter well-established standards regarding certain kinds of rules where the Board has already struck a balance between employee rights and employer business interests." GC 18-04 at 1 (Robb, June 6, 2018). The General Counsel advised that "[*Boeing*] did not deal with the 'special circumstances' test of apparel rules, although it may apply to aspects of

[2] It should be noted that the Union is not indicating that such balancing of employee rights and employer business interests has been properly struck doctrinally to safeguard sufficiently employee rights; rather that doctrinally the Board already employs such a framework to engage in such a balancing, underscoring the inapplicability of *Boeing* to this case.

apparel rules that are alleged to be unlawfully overbroad[,]"[3] while specifically noting that the Board's Decision and Order herein was such a case where the restrictions on union insignia were held to be unlawful by the Board "without reference to *Boeing* test." GC 18-04 at 2 n.4 (Robb, June 6, 2018).[4] Irrespective of Long Beach's mistaken reading of GC 18-04, General Counsel memoranda "do not constitute precedential authority and are not binding on the Board." *Atelier Condo. & Cooper Square Realty*, 361 NLRB 966, 1002 (2014).

2. The Court Lacks Jurisdiction to Consider Long Beach's Belated and Erroneous Argument that *Boeing* Is Controlling Precedent in this Case.

The Union adopts in its entirety and incorporates as its own the Board's argument that the Court lacks jurisdiction to consider Long Beach's remaining

[3] The General Counsel's non-precedential opinion in GC Memo 18-04 that aspects of apparel rules *may* implicate *Boeing* would necessarily have to do with a facially neutral rule, such as, for example, a requirement that employees maintain a neat and clean appearance, where a "reasonably construe" analysis may have been triggered prior to *Boeing*. Such a scenario is clearly not presented here, where substantial evidence supports the Board's finding that Policy PC-261.02, on its face, restricts the wearing of union badge reels outside immediate patient care areas (A. 801), and where Long Beach does not contest (LB Br. 28-34) that Policy #318's restrictions on wearing union pins and badges is not limited to immediate patient care areas. (A. 808.)

[4] It is plainly apparent the General Counsel noted the Decision and Order on review as an example of a case where doctrinally the balance between employee rights and employer business interests had already been struck by deciding the case under the "special circumstances" test rather than *Boeing*. Again, the Board applied the correct legal precedent, and the Court, as explained below, lacks jurisdiction under 29 U.S.C. § 160(e) to consider Long Beach's belated and erroneous argument that *Boeing* is the controlling precedent in this case.

challenges, including its meritless contention that the Board should have analyzed this case under *Boeing*. (NLRB Br. 32-37.)

The Union additionally submits the following. Long Beach's argument that *Boeing* is the controlling precedent in this case is not only erroneous, but Long Beach never raised it before the Board. (A. 2-4.) Therefore the Court lacks jurisdiction to hear such a challenge to the Order. See Section 10(e) of the Act, 29 U.S.C. § 160(e), which provides in pertinent part, that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

As this Court has observed, "[t]he Board's regulation interpreting this provision requires parties to set forth specifically the questions of procedure, fact, law, or policy to which exception is taken and concisely state the grounds for the exception." *Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 166-67 (2016) (internal quotation marks omitted.) See 29 C.F.R. § 102.46(a)(1)(i)(D) and 29 C.F.R. § 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.") And as this Court has long held, "Section 10(e) applies 'regardless of whether the questions raised be considered questions of law, questions of fact, or mixed questions of fact and law. *Alden Leeds, Inc. v. NLRB*, 812 F.3d at 168

(quoting *P.R. Drydock & Marine Terminals, Inc. v. NLRB*, 284 F. 2d 212, 215-16 (D.C. Cir. 1960)).

Boeing issued on December 14, 2017, over four months prior to the Board's Decision and Order herein, on April 20, 2018 (A. 786). Long Beach did not move for reconsideration to raise its *Boeing* challenge before the Board, and the failure to do so prevents consideration of the question by the courts. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982); *HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015). Any argument by Long Beach that Section 10(e)'s jurisdictional bar does not apply because its exceptions were "adequate to put the Board on notice that the issue might be pursued on appeal," *Consol. Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981), would be logically impossible, as *Boeing* issued nearly two years after the last submission to the Board in this case by the parties. (A. 2-4.)

Section 10(e) thus deprives the Court of jurisdiction over Long Beach's eleventh hour *Boeing* challenge to the Order, absent "extraordinary circumstances." 29 U.S.C. § 160(e). And Long Beach has not asserted any extraordinary circumstances in its opening brief that could overcome Section 10(e)'s jurisdictional restriction. As this Court has repeatedly ruled, "in order to prevent the 'sandbagging' of another party, 'we have generally held that issues not raised until the reply brief are waived.'" *New York Rehab. Care Mgmt., LLC v.*

NLRB, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (quoting *Bd. of Regents of the Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996)). See also *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1171 (D.C. Cir. 1995).

In *New York Rehab. Care Mgmt. v. NLRB*, this Court explained that "[t]he Company's initial brief included a heading regarding whether the Board adequately explained its decision, but its brief addresses only the Board's procedures." *New York Rehab. Care Mgmt., v. NLRB*, 506 F.3d at 1076. Thus the Court concluded that "'[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work.'" *Id.* (quoting *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). Long Beach has made no mention whatsoever in its opening brief of any extraordinary circumstances under Section 10(e) to excuse its failure to raise its *Boeing* challenge to the Board, and therefore has waived the issue for consideration by the Court in a reply brief.

Though the issue of extraordinary circumstances sufficient to overcome Section 10(e)'s jurisdictional bar has been waived by Long Beach, should it argue in any event that filing a motion for reconsideration of the Order would have been an exercise in futility, any such argument is meritless, as this Court has rejected such arguments as probative of extraordinary circumstances. See *W&M Properties of Conn., Inc.*, 514 F.3d 1341, 1346 (D.C. Cir. 2008) (rejecting petitioner's

argument that "reconsideration would have been futile in light of the new remedial framework announced in *Planned Building Services, Inc.*, 347 NLRB No. 64 (2006)"). This Court has found extraordinary circumstances when filing a motion for reconsideration would constitute "patent futility," where the agency in other instances had already rejected the "contested argument in other proceedings." *W&M Properties of Conn., Inc.*, 514 F.3d at 1346 (citing *NLRB v. FLRA*, 2 F.3d 1190, 1196 (D.C. Cir. 1993)). Although a motion for reconsideration to raise the *Boeing* challenge, in the Union's view, would not have persuaded the Board to alter its decision, as, again, it employed the correct legal standard in union insignia cases, there is no argument, nor has Long Beach raised one, that filing a motion for reconsideration would have been a patently futile exercise by Long Beach.

This Court has found extraordinary circumstances sufficient to overcome Section 10(e)'s jurisdictional bar when a challenge has not been made to the Board, concerning "questions that go to very power of the Board to act and implicate fundamental separation of powers concerns." *Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), aff'd, 134 S. Ct. 2550 (2014). There are no such questions herein that go to the very power of the Board to act.

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B. Substantial Evidence Supports the Board's Findings that Long Beach Violated Section 8(a)(1) of the Act by Prohibiting Employees from Wearing Union Pins, Badges, and Badge Reels in Non-Immediate Patient Care Areas

The Union adopts in its entirety and incorporates as its own the Board's argument that substantial evidence supports the Board's findings that Long Beach violated Section 8(a)(1) of the Act by prohibiting employees from wearing union pins, badges, or badge reels in non-immediate patient care areas. (NLRB Br. 12-32.)

C. The Court Need Not Address Long Beach's Challenge to the Certified List.

The Union adopts in its entirety and incorporates as its own the Board's argument that Long Beach's challenge to the certified list is meritless. (NLRB Br. 37-40.)

CONCLUSION

For all of the foregoing reasons, the Union respectfully requests that the Court enter a judgment denying the petition for review and enforcing the Board's Order in full.

DATED: February 11, 2019

Respectfully submitted,

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES UNITED (CNA/NNU)
LEGAL DEPARTMENT

/s/ Micah Berul

Nicole Daro

Micah Berul
California Nurses Association/
National Nurses United (CNA/NNU)
Legal Department
155 Grand Avenue
Oakland, CA 94612
Telephone: 510-273-2200
Facsimile: 510-663-4822
ndaro@calnurses.org
mberul@calnurses.org
Counsel for Intervenor
California Nurses Association/
National Nurses United (CNA/NNU)

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B) and District of Columbia Circuit Rule 32(e)(2)(B), I certify that the attached brief is proportionately spaced, has a typeface of 14 points and contains 2,749 words.

DATED this 11th day of February, 2019.

CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES UNITED
COMMITTEE LEGAL DEPARTMENT

s/ Micah Berul

Micah Berul
Attorneys for Intervenor
California Nurses Association/
National Nurses United

CERTIFICATE OF SERVICE

Long Beach Memorial Medical Center, d/b/a MemorialCare Long Beach Medical Center & MemorialCare Miller Children's and Women's Hospital of Long Beach
v.
National Labor Relations Board

District of Columbia Circuit Case Nos. 18-1125, 18-1143

I am over the age of 18 years, employed in the County of Alameda, State of California, and not a party to the within action. My business address is 155 Grand Avenue, 2nd Floor, Oakland, CA 94612.

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on February 11, 2019. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 11, 2019 at Oakland, California.

/s/ Tym Tschneaux
Tym Tschneaux